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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 746

THE HUDSON MOTOR CAR COMPANY,
a Michigan Corporation,
Petitioner,
vs.
GUSTAV C. HERTZ, Administrator c. t. a. of the
Estate of Lois Crane Hertz,
Respondent.

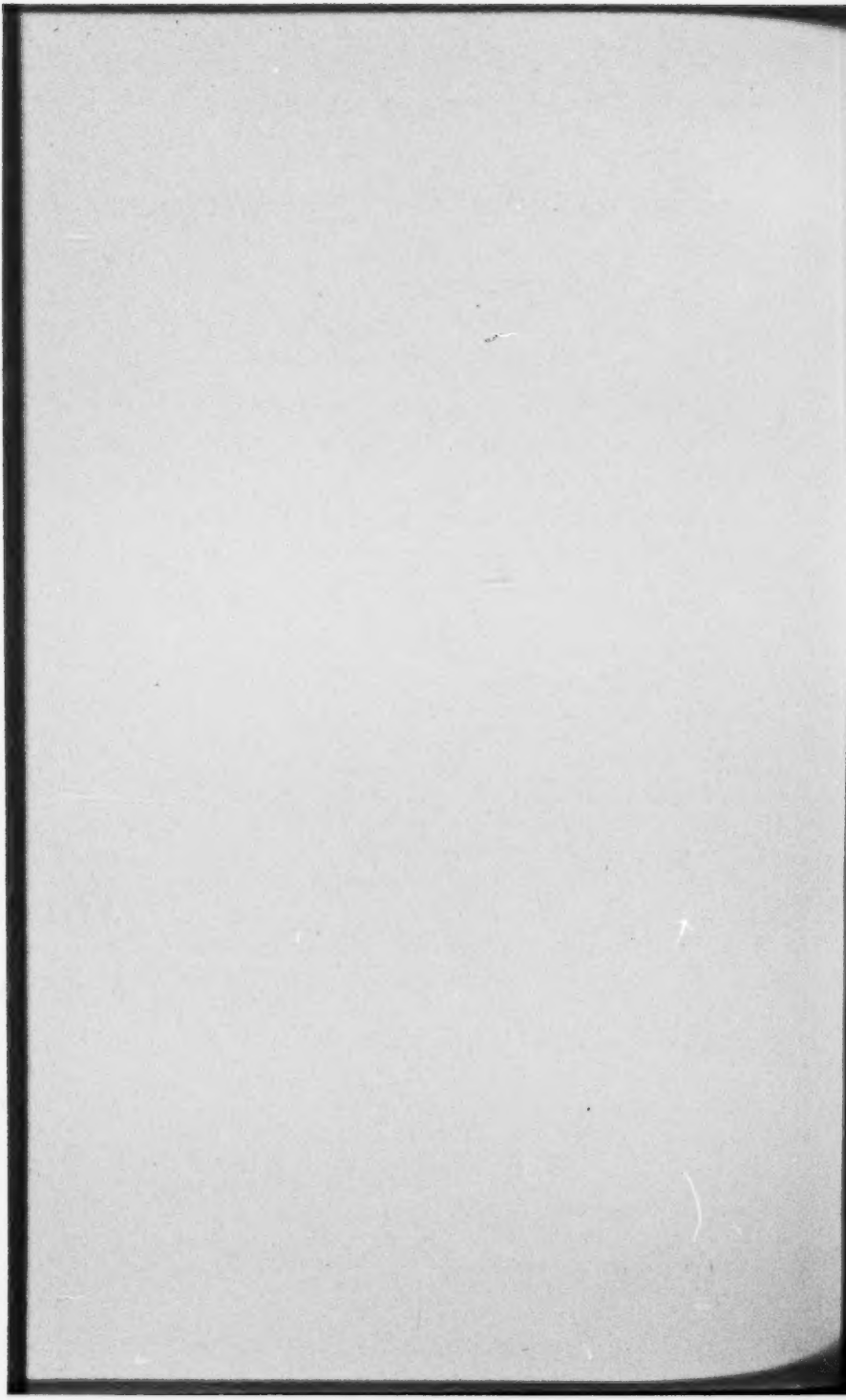
No. 747

MOTOR WHEEL CORPORATION,
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Petitioner,
vs.
GUSTAV C. HERTZ, Administrator c. t. a. of the
Estate of Lois Crane Hertz,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a civil action in the nature of an action at law brought in the United States District Court for the Eastern District of Michigan, by Gustav C. Hertz, Administrator c.t.a. of the Estate of Lois Crane Hertz, respondent herein, against the Hudson Motor Car Company and the Motor Wheel Corporation, Michigan corporations, petitioners herein, to recover damages in excess of $3,000 arising out of the death of respondent's wife as the result of an accident which occurred in Virginia (R. 6). The trial was by jury in the District Court and a verdict and judgment were rendered in favor of respondent against petitioners for $9,522.55 (R. 62, 63). Appeals from that judgment were taken by petitioners to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court (R. 87, 88, 105, 106). The principal question involved in that appeal was whether this action is barred by the limitation contained in the Virginia statute creating a cause of action for wrongful death. The Circuit Court of Appeals decided that this action is not barred by that limitation (R. 106).

Respondent's wife was injured in an automobile accident which occurred on April 13th, 1938, while she was riding in a Hudson automobile which was being driven along a Virginia highway (R. 7). No other vehicles were involved in the accident. This car turned suddenly to the left and rolled over on the shoulder of the highway. Mrs. Hertz died on April 18th, 1938 (R. 7). Respondent, a resident of Virginia, was appointed administrator of his wife's estate on November 23rd, 1938 (R. 6, 10). This action was commenced on April 26th, 1939, more than one year after

the death of Mrs. Hertz, the jurisdiction of the District Court being invoked on the ground of diversity of citizenship (R. 6).

It was alleged in respondent's complaint that the accident resulting in the death of Mrs. Hertz was caused by the collapse of one of the wheels of the Hudson car in which she was riding. It was further alleged that the Motor Wheel Corporation, petitioner herein, was negligent in the manufacture, assembly and inspection of the wheel which collapsed and that the Hudson Motor Car Company, petitioner herein, was negligent in its inspection of that wheel (R. 6).

Motions to dismiss this cause were filed on behalf of both petitioners by separate counsel, on the ground that this action is barred by the limitation contained in Section 5786 of the Code of Virginia of 1936, which constitutes a portion of the Virginia statute creating a cause of action for wrongful death (R. 11, 16, 20).

The pertinent portions of the two principal sections of that statute are as follows:

> "Section 5786.
>
> "Whenever the death of a person shall be caused by wrongful act, neglect or default of any person or corporation * * *, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action * * * and to recover damages in respect thereof, then, and in every such case, the person or corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages, * * * notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as

amount in law to a felony. And any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured party.

"Every action under this section shall be brought within one year next after the right to bring same shall have accrued, notwithstanding the provisions of Section 5818."

"Section 5787.

"Every such action shall be brought by and in the name of the personal representative of such deceased person and within one year after his or her death, but if any such action is brought within said period of one year after said person's death, and for any cause abates or is dismissed without determining the merits of said action, the time said action is pending shall not be counted as any part of such period of one year, and another suit may be brought within the remaining period of said one year as if such former suit had not been instituted. * * * The jury in any such action may award such damages as to it may seem fair and just, not exceeding $10,000.00, and may direct in what proportion that shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. * * * But nothing in this section shall be construed to deprive the Court of the power to grant any trials as in other cases."

The first sentence of Section 5786 and all of Section 5787 which is quoted herein, constituted the major portion of the statute as it was originally enacted in 1871. Until 1926 there was only one limitation in the statute, that found in the first sentence of Section 5787, which provides that every such action shall be brought within one year after the death of the deceased person. In 1926, the Legislature of Virginia amended Section 5786 by adding to it the second sentence of the first paragraph and the second paragraph, without expressly repealing any portion of Section 5787. Acts of Assembly of Virginia, 1926, Chap. 507, p. 858. The limitation created by the amendment of 1926 differs from the limitation in Section 5787 in that it requires every action "under this section" to be brought within one year after "the right to bring same shall have accrued."

The motions to dismiss were denied (R. 27) and separate answers were filed (R. 28, 35, 36). Both petitioners denied that they had been guilty of any negligence which contributed to the death of Mrs. Hertz. The Hudson Motor Car Company alleged that this action is barred by the limitation in Section 5786 (R. 28, 33). The Motor Wheel Corporation alleged, by incorporation of the grounds set forth in its motion, that this action is barred by the same limitation (R. 36, 37).

At the commencement of the trial, counsel for petitioners orally moved for a judgment in their favor for the reason that respondent's complaint did not set forth the Wrongful Death Act (R. 48). By leave of Court, respondent then filed two supplements to his complaint setting forth Sections 5786, 5787, 5788 and 5809 of the Virginia Code (R. 42, 50, 57). The Motor Wheel Corporation subsequently filed an answer to the supplements, asserting that this action is barred by the limitation in Sections 5786 and

5787 (R. 45). Counsel for petitioners also moved that this action be dismissed for the reason that it is barred by the limitation in both of those sections (R. 53, 54, 57, 58). At the conclusion of respondent's case, a motion for a directed verdict was made on behalf of both petitioners on the ground that the action is barred by both of these sections (R. 59). At the conclusion of all the testimony the motion for directed verdict was renewed (R. 61).

On appeal to the Circuit Court of Appeals, petitioners contended that the action is barred by the limitation in both sections. The heading above the principal portion of the argument in petitioner's brief filed in that Court is as follows:

> "The Court erred in failing and refusing to rule as a matter of law that this action is barred by the limitation contained in Sections 5786 and 5787 of the Code of Virginia of 1936."

On application for rehearing, petitioners contended that the only limitation applicable to this action is that in Section 5787. The following portion of the brief filed by petitioners on rehearing states the contention made by petitioners at that time (R. 128):

> "We contend now that the limitation in Section 5787 relates only to actions for wrongful death, whereas the limitation in Section 5786 relates only to actions brought against the estates of wrongdoers. It follows that the only limitation applicable to actions for wrongful death against living wrongdoers, is that found in Section 5787."

In affirming the judgment entered by the District Court, the Circuit Court of Appeals held that this action is not barred by reason of the fact that it was not commenced within one year after the death of Mrs. Hertz, inasmuch as it was started within one year after the appointment of

respondent as administrator of his wife's estate (R. 106, 110). The Court based its decision on these two conclusions: First, the limitation in Section 5787 was repealed by implication by the subsequent enactment of the limitation in Section 5786 (R. 113). Second, Section 5786 should be construed to mean that a cause of action for wrongful death does not accrue until the appointment of an administrator for the decedent, and the limitation in that section does not commence to run until that time (R. 114).

Consideration of three other sections of the Virginia Code is necessary to an understanding of this case. The applicable portions of those sections are as follows:

> "Section 5809.
>
> "The period of one year from the death of any party shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy."

> "Section 5818.
>
> "Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that if a party die, it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring same shall have accrued."

> "Section 5790.
>
> "The right of action under Sections 5786 and 5787, shall not determine, nor the action, when brought, abate by the death of the defendant, or the dissolution of the corporation when a corpo-

ration is the defendant; and where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured died pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative. If the death resulted from the injury, the declaration and other pleadings shall be amended so as to conform to an action under Sections 5786 and 5787, and the case proceeded with as if the action had been brought under the said sections. But in such cases there shall be but one recovery for the same injury. And any right of action which may hereafter accrue by reason of any injury done to the person of another, and not resulting in death, by the wrongful act, neglect, or default of any person, shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured party. * * *"

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals that the enactment of the limitation now found in Section 5786 repealed the limitation in Section 5787 by implication and that this action is not barred by the latter, is probably in conflict with the following applicable decisions:

Richmond v. Sutherland, 114 Va. 688.
Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245.
Scott v. Lichford, 164 Va. 419.
Piedmont Finance Corp. v. Commonwealth, 146 Va. 287.
City of Clifton Forge v. McDaniel, 143 Va. 325.
Manuel, Administrator v. Norfolk & Western R. Co., 99 Va. 188.
Dowell v. Cox, 108 Va. 460.
Steffey v. King, 126 Va. 120.

2. The decision of the Circuit Court of Appeals that Section 5786 should be construed to mean that the limitation therein does not commence to run until the appointment of an administrator for the decedent, is probably contrary to the following Virginia statute and the unanimous decisions of all other courts which have ruled on this question:

Section 5809 of the Code of Virginia.
Reading Co. v. Koons, Administrator, 271 U. S. 58.
Bickford v. Furber, 271 Mass. 94.
Seaboard Air Line Ry. v. Brooks, 151 Ga. 625.
Faulkner's Administrator v. Louisville & Nashville R. Co., 184 Ky. 533.

Terbush v. Boyle, 217 Wis. 636.
Hanna Administrator v. Jeffersonville R. Co., 32 Ind. 113.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its Docket, No. 8193, the Hudson Motor Car Company, a Michigan Corporation, Appellant, v. Gustav C. Hertz, Administrator c. t. a. of the Estate of Lois Crane Hertz, Appellee, and in the case numbered and entitled on its Docket, No. 8914, Motor Wheel Corporation, a Michigan Corporation, Appellant, v. Gustav C. Hertz, Administrator c. t. a. of the Estate of Lois Crane Hertz, Appellee, to the end that these causes may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of the said United States Circuit Court of Appeals be reversed by this Court, and for such other further relief as to this Court may seem proper.

Dated: November 12, 1941.

THE HUDSON MOTOR CAR COMPANY, a Michigan Corporation.
MOTOR WHEEL CORPORATION, a Michigan Corporation.
By: IVIN E. KERR,
KERR, LACEY & SCROGGIE,
Counsel for Petitioners.